

1 RENE L. VALLADARES

Federal Public Defender

2 Nevada Bar No. 11479

DAVID ANTHONY

3 Assistant Federal Public Defender

Nevada Bar No. 7978

4 david_anthony@fd.org

BRAD D. LEVENSON

5 Assistant Federal Public Defender

6 California Bar No. 166073

brad_levenson@fd.org

7 TIMOTHY R. PAYNE

Assistant Federal Public Defender

8 Ohio Bar No. 0069329

tim_payne@fd.org

9 411 E. Bonneville, Ste. 250

Las Vegas, Nevada 89101

10 (702) 388-6577

11 (702) 388-5819 (Fax)

12 Attorneys for Zane M. Floyd

13 UNITED STATES DISTRICT COURT

14 DISTRICT OF NEVADA

15
16 ZANE M. FLOYD,

17 Plaintiff,

18 v.

19 CHARLES DANIELS, Director, Nevada
20 Department of Corrections; HAROLD
WICKHAM, NDOC Deputy Director of
Operations; WILLIAM GITTERE,
21 Warden, Ely State Prison; WILLIAM
REUBART, Associate Warden at Ely State
22 Prison; DAVID DRUMMOND, Associate
Warden at Ely State Prison; IHSAN
23 AZZAM, Chief Medical Officer of the State
of Nevada; DR. MICHAEL MINEV, NDOC
24 Director of Medical Care, DR. DAVID

Case No. _____
(To be Supplied by Clerk)

**PLAINTIFF'S MOTION FOR
DISCLOSURE OF METHOD OF
EXECUTION**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
BY THE STATE FOR THE WEEK
OF JUNE 7, 2021**

1 GREEN, NDOC Director of Mental Health
2 Care, LINDA FOX, NDOC Director of
3 Pharmacy; JOHN DOES I-XV, NDOC
4 execution team members,

Defendants.

5
6 DATED this 16th day of April, 2021.

7 Respectfully submitted
8 RENE L. VALLADARES
9 Federal Public Defender

10 /s/ David Anthony
11 DAVID ANTHONY
12 Assistant Federal Public Defender

13 /s/Brad D. Levenson
14 BRAD D. LEVENSON
15 Assistant Federal Public Defender

16 /s/ Timothy R. Payne
17 TIMOTHY R. PAYNE
18 Assistant Federal Public Defender
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POINTS AND AUTHORITIES

I. INTRODUCTION

The State of Nevada, through the Clark County District Attorney Office's April 14, 2021 filing in state court requesting a Second Supplemental Warrant of Execution, seeks to execute Zane Floyd during the week commencing June 7, 2021. The State, however, does not have the means to carry out the execution in compliance with its own execution protocol. The current execution protocol calls for a three-drug lethal injection procedure in which the drugs midazolam, fentanyl and cisatracurium are to be sequentially injected intravenously into Floyd's body. It is apparent from various accounts, including those from state officials positioned to know, that the State does not have the drugs needed to carry out this procedure. Zane Floyd therefore requests this Court issue an order requiring Defendants to disclose the method by which it intends, in less than one month from the date of this motion, to carry out his execution.

II. APPLICABLE LEGAL STANDARDS

Floyd is entitled to this information pursuant to his instant 42 U.S.C. § 1983 Complaint and his rights under the United States Constitution. He has a constitutional right to be executed humanely and to not suffer through an excruciating execution.

A. Eighth Amendment

The Eighth Amendment protects inmates from execution methods that pose a substantial risk of causing cruel pain and suffering if another available method would significantly reduce the risk. *See Bucklew v. Precythe*, 139 S. Ct 1112, 1125,

1 1129 (2019). For this protection to have effect, inmates must be able to challenge
2 critical aspects of their own execution. The “right to be heard before being
3 condemned to suffer grievous loss of any kind . . . is a principle basic to our society.”
4 *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J.,
5 concurring). The only meaningful time that an inmate can challenge the method of
6 his own execution is before he is executed. “There is no redo.” *Lopez v. Brewer*, 680
7 F.3d 1084, 1092 (9th Cir. 2012) (Berzon, J., concurring in part and dissenting in
8 part from denial of rehearing en banc).

9
10 The Eighth Amendment’s ban on cruel and unusual punishment “must draw
11 its meaning from the evolving standards of decency that mark the progress of a
12 maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Without knowing
13 Nevada’s intended method for executing Floyd, it is impossible for him or this Court
14 to determine whether the method comports with evolving standards of decency.
15 Moreover, it is consistent with any standard of decency, whether evolving or not,
16 that the State inform Floyd and the citizens of Nevada how it intends to put him to
17 death.

18 **B. Fourteenth Amendment Due Process**

19 The requested disclosure is also consistent with requirements of due process
20 under the Fourteenth Amendment. The Due Process Clause protects individuals
21 from deprivations of “life, liberty, or property, without due process of law.” U.S.
22 Const. amend. XIV. A procedural due process violation “occurs when an official
23 deprives an individual of a liberty or property interest without providing
24 appropriate procedural protections. Liberty interests arise out of the Constitution
25

1 itself or ‘may arise from an expectation or interest created by state laws or policies.’”
 2 *Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (quoting
 3 *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). The method by which the state will
 4 conduct an execution implicates a condemned inmate's life interest in avoiding
 5 “unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173
 6 (1976).¹ Procedural due process in turn protects a condemned inmate's right not to
 7 be executed in a manner that violates the Eighth Amendment. *See Ohio Adult*
 8 *Parole Authority v. Woodard*, 523 US 272, 281 n.3 (1998) (“This substantive
 9 constitutional prohibition [against cruel and unusual punishment] implicate[s] due
 10 process protections.”).

12 Because Floyd has a constitutionally cognizable interest in not being
 13 executed inhumanely, the manner of his execution is subject to the requirements of
 14 procedural due process. “For more than a century the central meaning of procedural
 15 due process has been clear: ‘Parties whose rights are to be affected ... must first be
 16 notified.’” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68

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 19 ¹ A condemned inmate “maintains a residual life interest” in an execution being
 20 conducted consistent with the requirements of the Constitution. *Ohio Adult Parole*
 21 *Authority v. Woodard*, 523 U.S. 272, 281 (1998); *see also id.* at 288 (O'Connor,
 22 concurring in part and concurring in the judgment) (“A prisoner under a death
 23 sentence remains a living person and consequently has an interest in his life.”); *id.*
 24 at 291 (Stevens, J., concurring in part and dissenting in part) (“There is ... no room
 25 for legitimate debate about whether a living person has a constitutionality protected
 interest in life. He obviously does.”). That interest is “separate from the life interest
 already adjudicated in the inmate's conviction and sentence.” *Id.* at 281 n.3. Thus,
 for example, a condemned inmate cannot be “summarily executed by prison guards.”
Id. at 281.

U.S. (1 Wall.) 223, 233 (1863)). Notice, however, is not an end to itself, but rather a means “to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing,’” *Memphis Light, Gas & Water Div. v. Craft*, 436 US 1, 14 (1978), during which he has “an opportunity to present [his] objections,” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“The opportunity to present reasons ... why proposed action should not be taken is a fundamental due process requirement.”). “If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.” *Fuentes*, 407 U.S. at 81.

In cases involving lethal injection protocols, at least three federal district courts have held that a condemned inmate has a due process right to notice of at least the method of execution. *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, 2018 WL 6529145 at *10 (S.D. Ohio December 12, 2018) (describing right to timely notice of method of execution as “correct application of the law”); *First Amend. Coal. of Arizona, Inc. v. Ryan*, 188 F. Supp. 3d 940 (D. Ariz. 2016) (similar), *aff’d in part, rev’d in part and remanded on other grounds*, 938 F.3d 1069 (9th Cir. 2019); *Oken v. Sizer*, 321 F. Supp. 2d 658, 665 (D. Md. 2004) (explaining that due process does not permit federal courts to “tak[e] [the state’s] word that [an inmate’s] rights will not be violated”).²

² There is additional precedent that inmates facing the death penalty are entitled to notice when there has been a post-conviction change in method of execution. *See, e.g., Stewart v. LaGrand*, 526 U.S. 115, 119 (1999); *Vickers v.*

C. Fourteenth Amendment Equal Protection

The State's failure to provide Floyd with notice of the method of execution also violates his Fourteenth Amendment right to equal protection. The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Supreme Court has stated that this language "embodies the general rule that States must treat like cases alike." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one person differently from others similarly situated without any rational basis for the difference. *Id.*; see *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (holding that equal protection claims may be brought by a "class of one"). When the disparate treatment burdens a fundamental right, strict scrutiny applies. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

The State is treating Floyd disparately in depriving him of his fundamental right to notice of the manner in which the State intends to carry out his execution. Since reinstatement of the death penalty by the United States Supreme Court approximately 45 years ago, the State has traditionally had an execution protocol in

Stewart, 144 F.3d 613, 617 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997); see also *Sims v. Florida*, 754 So.2d 657, 665 (Fla. 2000); *DeShields v. State*, 534 A.2d 630, 639 n. 7 (Del. 1987); *Wetzel v. Wiggins*, 85 So.2d 469, 471 (Miss. 1956); *State v. Fitzpatrick*, 684 P.2d 1112, 1113 (Mont. 1984); but cf., *Beaty v. Brewer*, 649 F.3d 1071, 1074 (9th Cir. 2011) (substitution of one barbiturate for another did not present basis for stay of execution, where petitioner "failed to provide any factual support for his claim," and "failed to suggest any way in which the modified protocol is constitutionally objectionable.").

1 effect that it intended to follow and did not withhold from the condemned inmates
2 in carrying out imposed sentences of death. Of the twelve inmates executed by
3 Nevada since reinstatement, Floyd is aware of no one from whom the State kept
4 hidden its intended method of execution. Floyd demands equal treatment from the
5 State in this respect.

6 **III. APPLICATION OF LAW TO ZANE FLOYD**

7 The State intends to kill Floyd in the very near future, and it is unknown
8 how the State plans to carry this out. Various reports in the media suggest the
9 Nevada Department of Corrections (NDOC) does not possess the three drugs
10 required under its June 11, 2018 execution protocol for carrying out Floyd's
11 execution. At the same time, Floyd is unaware of the State having any other drugs
12 (e.g., pentobarbital) acquired for purposes of carrying out an execution.
13

14 Thus, Floyd does not possess the most basic information regarding the State's
15 intended method of execution and is not even assured that the intended method is
16 by lethal injection as opposed to some other means. Floyd does not know what the
17 State's new proposed method of execution is; whether the new protocol calls for use
18 of drugs different than those under the current protocol; if new drugs are to be used,
19 the manufacturers of those drugs; if new drugs are to be used, how they will be
20 administered, and in what sequence and dosages; whether there is a new written
21 execution protocol for the proposed method; whether the new written execution
22 protocol, if any, has been appropriately reviewed, approved by signature, and given
23 an effective date; whether the new execution method was developed in conformance
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1 with state law (*e.g.*, whether the NDOC Director properly consulted with the State's
2 Chief Medical Officer in selecting the drug or combination of drugs to be used in the
3 execution, *see* Nev. Rev. Stat. § 176.355.2.b); and whether the new protocol provides
4 for the basic equipment, medical staff, staff training and other necessary safeguards
5 to reasonably ensure a humane and constitutional execution of Floyd.

6 The State is required to disclose at least the basic information regarding its
7 intended method of executing Floyd and cannot be permitted to effectively insulate
8 itself from judicial review. *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-
9 1016, 2018 WL 1033486 (S.D. Ohio February 22, 2018); *First Amendment Coalition*
10 *of Arizona*, 188 F. Supp. 3d 940. In the case of *In re Ohio Execution Protocol*
11 *Litigation*, the court addressed plaintiffs' claim of a right to have notice of the
12 manner of execution including a right to notice of changes in Ohio's method. The
13 magistrate judge looked to *First Amendment Coalition of Arizona*, noting that the
14 Arizona court observed that death row inmates have an interest in predictability of
15 method of execution which "must be weighed against the State's interest in
16 flexibility." *In re Ohio Execution Protocol Litigation*, 2018 WL 1033486, at *24
17 (quoting *First Amendment Coalition of Arizona*, 188 F. Supp. 3d at 953). The *Ryan*
18 court further recognized that "[i]n some cases, the State's change to an inmate's
19 execution method may be so significant, so near the date of execution, and so
20 unsupported by state interests, that it denies the inmate the process he is due in
21 order to raise an Eighth Amendment challenge." *Id.* Considering this precedent, the
22 magistrate judge agreed "with the *Ryan* court that Plaintiffs are entitled to
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1 sufficient notice of changes in Ohio's method of execution to permit them to litigate
2 such changes as threaten their Eighth Amendment rights,” *In re Ohio Execution*
3 *Protocol Litigation*, 2018 WL 1033486 at *24, although it rejected plaintiffs’ claim
4 that Ohio’s execution protocol was unconstitutional for failing to provide a “firm
5 deadline for any variations on the [p]rotocol,” *id.* The district court adopted the
6 magistrate judge’s analysis and ruling on this issue. *In re Ohio Execution Protocol*
7 *Litigation*, 2018 WL 6529145 at *10.

8
9 A different federal district court ruled similarly in *Oken*, 321 F. Supp. 2d at
10 665. There, the court recognized that judicial review of a state's method of execution
11 is only possible with disclosure of the protocol: “Obviously, the fact of court review of
12 the protocols presupposes their production.” *Id.* at 664. The court found the right to
13 disclosure of the information was premised on the right of due process:

14 Fundamental fairness, if not due process, requires that
15 the execution protocol that will regulate an inmate's
16 death be forwarded to him in prompt and timely fashion.
17 While the Court has located no cases specifically
18 establishing a right of production, it is clear that in
19 innumerable death penalty cases the execution protocols
20 have been examined by courts for their compliance with
21 constitutional requirements. *See, e.g., Nelson*, 124 S. Ct.
22 2117; *In re Williams*, 359 F.3d 811 (6th Cir. 2004); *Poland*
23 *v. Stewart*, 117 F.3d 1094 (9th Cir. 1997); *Campbell v.*
24 *Wood*, 18 F.3d 662 (9th Cir. 1994); *Cooper v. Rimmer*,
25 2004 WL 231325 (N.D.Cal. 2004), *aff'd*, 358 F.3d 655; *Cal.*
First Amendment Coalition v. Woodford, 2000 WL
33173913 (N.D.Cal. 2000), *aff'd*, 299 F.3d 868; *Jones v.*
McAndrew, 996 F.Supp. 1439 (N.D.Fl. 1998); *LaGrand v.*
Lewis, 883 F.Supp. 469 (D.Ariz. 1995). Obviously, the fact
of court review of the protocols presupposes their
production.

Due process requires nothing less—an opportunity to
receive notice of how one's rights will be affected and
opportunity to respond and be heard. *Cf. Mullane v.*
Central Hanover Bank, 339 U.S. 306, 314 (1950).

1 *Id.* at 664–65 (footnote and additional citations omitted). The court then ruled that
2 the plaintiff was “entitled to show—or at least to attempt to show—how his rights
3 have been affected by the changes in the Execution Protocol.” *Id.* at 665.

4 The reasoning of the federal district courts in *In Re Ohio Litigation*, *Ryan*,
5 and *Oken* is apposite to the case at hand. If anything, the circumstances presented
6 in Nevada are even more dire because the State has a recent history of approving
7 lethal injection procedures that are experimental, having never before been used in
8 carrying out an execution. The last two execution protocols (both three-drug
9 procedures) approved by signature of the Director of the Nevada Department of
10 Corrections have provided for an unprecedented use of a paralytic agent as the
11 final, killing drug. This presents a dangerous, untried, and untested method of
12 execution, as borne out by the findings made by the only state court to rule on the
13 merits of an Eighth Amendment challenge to the three-drug procedure. *See* Exhibit
14 7 to Complaint for Injunctive and Declaratory Relief Due to Proposed Method of
15 Execution Pursuant to 42 U.S.C. § 1983 (decision by the Eighth Judicial District
16 Court for the State of Nevada holding that Nevada’s proposed use of the paralytic
17 cisatracurium as the third and final drug in conducting a lethal injection execution
18 presented an unconstitutional “substantial risk of serious harm” and “an objectively
19 intolerable risk of harm” under the Eighth Amendment).³

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21 ///

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24 ³ *Rev’d on procedural grounds, Nevada Dep’t of Corr. v. Eighth Judicial*
25 *District Court (Dozier)*, 134 Nev. 1014, 417 P.3d 1117 (2018) (unpublished).

IV. CONCLUSION

Accordingly, for all of the above reasons, Plaintiff Zane Floyd respectfully requests this Court grant his motion and enter an order requiring Defendants to disclose information on the method of execution intended to be used during the week commencing June 7, 2021.

DATED this 16th day of April, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Timothy R. Payne
TIMOTHY R. PAYNE
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with LR IC 4-1(c) of the Local Rules of Practice, the undersigned hereby certifies that on the 16th day of April, 2021, a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR DISCLOSURE OF METHOD OF EXECUTION was filed electronically with the CM/ECF electronic filing system and was sent via email, addressed to counsel as follows:

D. Randall Gilmer
Chief Deputy Attorney General
Office of the Nevada Attorney General
Public Safety Division
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
Phone: 702.486.3427
Fax: 702.486.3773
drgilmer@ag.nv.gov

/s/ Sara Jelinek

An Employee of the Federal Public
Defenders Office, District of Nevada